



TC01663

Appeal number: TC/2010/09315

APPEAL OUT OF TIME – application for extension in light of Enersys decision - extension refused.

FIRST-TIER TRIBUNAL

TAX

TNT GRS 2008 LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: Judge Richard Barlow

Sitting in public at Manchester, on 15 November 2011

Tim Brown of counsel for the Appellant

Alan Bates of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

- 5 1. This decision concerns an application made by TNT GRS 2008 Limited for an extension of time in which to appeal to the First-Tier Tribunal against default surcharges assessed on 20 August 2008 in the sum of £69,022 based on the 2% rate for the period ending 30 June 2008 and on 21 August 2009 in the sum of £195,351 based on the 5% rate for the period ending 30 June 2009. Those assessments of
10 default surcharges were issued to TNT Europe Ltd ('TNT'). The applicant was, at the time the application was made, the representative member of a group of which TNT Europe Ltd was a member.
- 15 2. TNT initially took no action about the first surcharge but on 11 September 2009 it asked its client relationship manager by email to review the decision to impose the second surcharge stating that the amount involved "is a very large sum even for a VAT group of our size". TNT was advised to write to the respondents' Liverpool office which it did on 9 November 2009 repeating the same comment and referring to a mistake and human error as the cause of the late payment that had given rise to the surcharge. At that time only the second surcharge was referred to.
- 20 3. The respondents replied on 9 December 2009 rejecting TNT's request to remove the surcharge. They said that their opinion was that TNT did not have a reasonable excuse and gave notice to TNT that it had a right of appeal to the Tribunal which must be exercised within 30 days and gave details about how to contact the Tribunal.
- 25 4. The tribunal released its decision in *Energys Holdings UK Limited* [2010] UKFTT 20 (TC) on 11 January 2010.
5. On 2 August 2010 the applicant wrote to HMRC requesting a further review as it wished HMRC to "consider the decision in the ... *Energys* case ..." and stating that it considered that case to be very similar to its own case.
- 30 6. On 9 November 2010 HMRC replied saying they were only permitted to carry out one review and referring back to the earlier letter about a formal appeal. It is not correct that HMRC is only permitted to carry out one review. The correct position is that it could carry out a further review under its care and management powers though it would not be obliged to do so. The applicant complained or at least drew my attention to the fact that the letter of 9 November did not repeat anything about a time
35 limit for appealing. There was no ambiguity about the earlier letter that did refer to the time for appealing and I do not consider any criticism on that score is justified. The commissioners did take a long time to reply to the letter of 2 August 2010.
- 40 7. On 10 December 2010 the applicant submitted a notice of appeal to the Tribunal and on 27 May 2011 the respondents submitted a detailed Statement of Case taking, for the first time, the point that the appeal had been submitted out of time and replying in detail to the appellant's case and, in effect, saying that they did not accept that the *Energys* case had been correctly decided.
8. Between the 10 December 2010 and 27 May 2011 the respondents had written a detailed letter dated 12 January 2011 explaining why they thought the appeal would

fail and defending the default surcharge regime as proportionate and contending that *Enersys* was wrongly decided. That letter was not written by the respondents' solicitor and I do not consider it very significant that the point about the appeal being out of time was not referred to. I certainly hold that the letter does not create an estoppel or raise any issue about abuse of process so far as concerns the fact that the commissioners later took the time point; nor did Mr Brown argue that any such question arose. It does however demonstrate that the commissioners have suffered no prejudice by the delay.

9. Mr Brown cited *Data Select* [2011] UKFTT 535 (TC) as persuasive authority for the proposition that when considering whether to allow an extension of time for submitting an appeal the Tribunal should have regard to CPR Rule 3.9(1) and I agree that is appropriate.

10. He stressed that the interests of justice are better served by allowing the application because TNT were unaware of the *Enersys* decision until shortly before they wrote to HMRC on 2 August 2010 and that in effect from that point the applicant had acted promptly in the sense that having asked for a review it acted promptly once it became clear that HMRC would not conduct a further review and that the delays were caused by HMRC from that point.

11. Mr Brown contended that the delay before the *Enersys* decision was released and, by implication, the delay before its significance came to TNT's attention should be ignored because, in effect, the applicant could not have known before that time that it had a potential ground of appeal based on proportionality and so could not have appealed; having accepted that it had no reasonable excuse or other defence. He also argued that a taxpayer who receives a surcharge assessment is at a disadvantage compared with a taxpayer who comes to realise it has overpaid tax because in the latter case the taxpayer may well be able to make a voluntary disclosure for four years of overpayments under the current legislation.

12. Mr Bates pointed out that where the Courts make decisions which change the perception of the law there will always be potential litigants who would have liked to have begun proceedings had they perceived the law in that way but that limitation periods and other time limits are deliberately designed to give finality and certainty. He made the point that, if Mr Brown's argument that *Enersys* changed perceptions and that that should entitle his client to appeal out of time is accepted, any taxpayer who has ever received a default surcharge could now seek to appeal. Logically there would be no cut-off point that could be identified to prevent that.

13. Mr Bates also argued that the *Enersys* point had in any event always been available to anyone who wanted to argue it and that it was not impossible for potential litigants to realise that, based on authority. The Judge in *Enersys* based his decision on existing precedent and so I agree with Mr Bates that the proportionality argument was available to be made had any potential litigant wished to make it. Mr Bates did not argue on the basis of "floodgates opening". If he had done so he would have been wrong in my judgment. A floodgates opening argument would seek to bring an extra-judicial factor into the process and that should be ignored. The law is the law and if that involves a flood of cases then so be it. Mr Bates' argument was that the reason for having time limits is that they are an important safeguard in the interests of legal

certainty and the better administration of justice and I agree that that is an important factor to consider.

14. I would add that the Courts and Tribunals must, in principle, be taken to have interpreted the existing law rather than to have made new law when they issue
5 decisions and so any litigant will always be in a difficult position to argue convincingly that a case could not have been brought earlier in circumstances such as the present.

15. Even if I agreed that the applicant could be regarded as knowing there was a potential ground of appeal only after the *Energys* decision had been released, there
10 was still a delay of nearly seven months before the applicant sought the second review and the argument that the delay should be excused because the applicant did not become aware of that decision sooner is unattractive. How long would the Tribunal be expected to allow for a potential litigant to become aware of the correct legal position? No obvious cut-off point would be apparent.

16. The overall delay in bringing the appeal is over two years for the earlier default
15 and over one year for the later one.

17. TNT is a very large company with, it is reasonable to assume, access to excellent legal and accountancy expertise and I regard that as a relevant factor in considering
20 whether it is fair and just to refuse the application for an extension of time. Both parties' interests and the interests of the administration of justice all come into consideration.

18. My decision is that the application is refused and that the appeal is out of time and that time will not be extended with the result that the appeal will not be entertained.

19. This document contains full findings of fact and reasons for the decision. Any
25 party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD BARLOW

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TRIBUNAL JUDGE
RELEASE DATE: 14 December 2011

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